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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 568

UNITED STATES OF AMERICA,

vs.

SWIFT & COMPANY, ET AL.

No. 569

AMERICAN WHOLESALE GROCERS' ASSOCIATION,

vs.

SWIFT & COMPANY, ET AL.

No. 570

NATIONAL WHOLESALE GROCERS ASSOCIATION,

vs.

SWIFT & COMPANY, ET AL.

PETITION OF SWIFT & COMPANY AND ARMOUR & COMPANY FOR REHEARING.

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PAUL M. GODEHN,
HENRY VEEDER,
CHARLES J. FAULKNER, JR.,
Attorneys for Appellees.

BYNUM-WARREN PRINTING COMPANY, CHICAGO.

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PETITION OF SWIFT & COMPANY AND ARMOUR & COMPANY FOR REHEARING.

The Appellees, Swift & Company and Armour & Company, present this, their petition for rehearing of the above-entitled cause, and in support thereof, respectfully represent to the Court the following:

I.

THE DECISION OF THE COURT IS BASED UPON THE ERRONEOUS ASSUMPTION THAT THE RECORD CONTAINS EITHER PROOF OR AN ADMISSION OR AN ADJUDICATION OF VIOLATION OF LAW BY THE DEFENDANTS.

The 1920 bill of complaint charges the defendants with violations of the anti-trust laws. The defendants' answers specifically deny each and every such charge. No evidence in support of such charges was offered. No admission of the truth of such charges was made by any of the defendants. No inference of the existence of facts to support the charges of the bill of complaint can arise from the defendants' consent, because the stipulation, pursuant to which the decree was entered clearly prevents such an inference. The decree itself states in express terms that the defendants

> "have consented and do consent to the making and entry of the decree now about to be entered, without any findings of fact, upon condition that their consents to the entry of said decree shall not constitute or be considered an admission and the rendition or entry of said decree or the decree itself, shall not constitute or be considered an adjudication that the defendants, or any of them, have in fact violated any law of the United States." (R. 153)

The brief filed by the Government in this Court states at page 28:

> "We do not contend that any presumption of unlawful conduct by the defendants arises from the allegations of the bill or the charges of the Commission, but we refer to them in order to explain the purpose of and reasons for the prohibitions of the decree."

Notwithstanding the denials contained in the defendants' answers, the limitation contained in the stipulation, the condition embodied in the decree itself

and the view of the Government as to the legal effect of the allegations of the bill of complaint, the opinion of this Court assumes the truth of the charges set forth in the bill of complaint. Thus, the Court says that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is *proved* to have been utilized in the past," though there is no *proof* whatever in the record to substantiate the Court's statement that the defendants utilized their size for purposes of abuse in the past. The Court says that size and past aggressions induced the fear in 1920 that the defendants, if permitted to deal in groceries, would drive their rivals to the wall, and further says, "size and past aggressions leave the fear unmoved today," though there is no proof whatever of any past aggressions by the defendants. The Court says that if the defendants were permitted to deal in groceries, they would have the opportunity "to renew the war of extermination that they waged in years gone by," though there is no proof whatever that the defendants ever waged a war of extermination against anyone or that they ever put a single competitor out of business or that they ever had the power to do so.

The bill of complaint charges that the advantage derived from the defendants' distributing system was used "temporarily to fix prices so low as to gradually eliminate competition (R. 17). All of the defendants denied this charge in their answers (R. 43, 71, 96, 121, 142, 148), and some of them alleged affirmatively in their answers that the number of wholesale grocers and the volume of their business had substantially increased since 1918 (R. 71, 96), but the Court nevertheless assumed the truth of the charge of the bill of complaint by stating,

"Whether the defendants would resume that

> practice if they were permitted to deal in groceries again, we do not know."

The Court refers to "the old-time abuses in the sale of other foods," though there is no evidence of abuses by the defendants in the sale of foods. The Court summarizes its opinion by stating,

> "The case comes down to this: the defendants had abused their powers so grossly and persistently as to lead to the belief that even when they were acting separately, their conduct should be subjected to extraordinary restraints."

There is no evidence in the record proving or tending to prove this accusation or to justify the Court in stating that the composition of 1920 "will not lightly be undone at the suit of *the offenders.*"

The assumption of the truth of the charges of the 1920 petition cannot be justified on the ground that the truth of such charges must be assumed in order to sustain the decree. In *Swift & Company* v. *United States,* 276 U. S. 311, 327, this Court answered the contention that the decree was void because not supported by either proof or admission of facts, by stating,

> "The allegations of the bill not specifically denied may have afforded ample basis for a decree limited to future acts."

There are no charges of violation of law in the bill of complaint which were not specifically denied by each of the defendants, and an assumption of past misconduct by the defendants cannot possibly be justified by the allegations of the bill of complaint which were not specifically denied.

The purpose of and reasons for the decree can be ascertained only from the allegations of the bill of complaint because the decree contains no findings of fact. There is a radical difference, however, between a reference to the charges of the bill of complaint for such a

purpose and an assumption of the truth of the charges of the bill of complaint for the purpose of branding the defendants as law-breakers so that it may be said upon the basis of past misconduct that they cannot safely be entrusted with the privilege of trading in groceries.

We respectfully submit that this cause should be determined by considering the facts in the record relating to the packing industry and the food industry in 1920, as compared with the facts in the record as to the same industries in 1930. The undisputed proof of present-day conditions establishes beyond reasonable debate there is now no reason for an apprehension of a food monopoly, and that being true, relief should not be denied upon the basis of an unjustified assumption that the defendants have been law-violators and therefore will continue to be law-violators. *If it be true that a presumption of future violation of law arises from proof of past violation of law, no such presumption can arise on this record because it does not contain any proof of violation of law by any of the defendants. The decree itself provides that it shall not constitute or be considered as an admission or an adjudication that the defendants or any of them have in fact violated any law of the United States, and there is no proof in the record of the violation of any law of the United States by any of the defendants.*

There is no justification for assertions that the defendants violated the anti-trust laws prior to 1920. There was but one occasion prior to 1920 when there was an actual trial of the defendants on such a charge. An indictment was returned in 1910 in the United States District Court for the Northern District of Illinois, charging the defendants with violations of the anti-trust laws.

Pleas of not guilty were entered and a trial in 1912 resulted in an acquittal. (R. 67-8.)

The intervenens appreciated the advantage to be derived from arguing their cause upon a premise of past misconduct by the defendants, and realizing that there was no proof to justify such an accusation, sought to support their charges by means of reports of *ex parte* investigations of the defendant meat packers. Violation of law cannot be established by such evidence (*United States* v. *International Harvester Co.*, 274 U. S. 693, 703), nor can it be established by assuming the truth of charges made in 1920 which were specifically denied by all the defendants in a proceeding which culminated in a consent decree entered without findings of fact and upon the condition that the defendants' consents to the entry of the decree

> "shall not constitute or be considered an admission and the rendition or entry of said decree or the decree itself shall not constitute or be considered an adjudication that the defendants, or any of them, have in fact violated any law of the United States." (R. 153.)

This condition is just as much a part of the decree as any other part thereof, and is not subject to change by this Court. The opinion of this Court violates this condition of the decree by statements to the effect that the defendants have been guilty of violation of law. Such assumptions are repugnant to the agreement adopted by the court and embodied in the decree, upon which the defendants in the exercise of good faith were entitled to rely. (*United States* v. *International Harvester Co.*, 274 U. S. 693, 705.

II.

THE COURT HAS OVERLOOKED THE FACT THAT THE GOVERNMENT WAIVED ITS RIGHT TO MAINTAIN THAT THE CONSENT OF THE DEFENDANTS TO THE RESTRAINTS OF THE DECREE, SHOULD BE CONSIDERED IN GRANTING OR REFUSING MODIFICATION.

When petitions were filed for modification of the consent decree of 1920, the Government as a party to the decree, had a right to waive any advantage it derived from the fact that the decree of 1920 was entered by consent (*Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S. 371, 380), and at the beginning of the hearing it elected to do so and requested the court to ignore the fact that the decree had been entered by consent. The Attorney General of the United States advised the Chancellor,

> "I have taken the position that the decree, although entered by stipulation and consent, is a judicial decree to be dealt with as such." (R. 387-8)

After the evidence had been introduced in the lower court, the Government could have urged that because the 1920 decree was entered by consent, the evidence was not sufficient to require modification, or the Government could have been silent on this subject. It did not do either, but filed a brief with the lower court, stating in part,

> "The decree is a judicial decree and to be dealt with as such. The fact that it originated in a consent arrangement does not give any greater or less effect to the attitude of the Attorney General on the question of modification than if the decree was entered after litigation. The question whether there should be a modification is a judicial question to be decided on the law and the evidence. Arguments advanced for or against the application by any of the parties, including the Government, are to be weighed by the Court and given the same consideration, no more and no less, than they would if the decree had followed litigation." (R. 1042)

The lower court quoted this portion of the Government's brief in its opinion (R. 1042), and the opinion of the lower court in its entirety clearly shows that it relied upon the position taken by the Government by ignoring the fact that the decree of 1920 is a consent decree.

In reaching the conclusion that the decree appealed from should be reversed, this Court was apparently influenced to a marked degree by the fact that the decree of 1920 was entered by consent. The Court definitely upheld the power of a court of equity to modify an injunctive decree, although entered by consent, but in considering the question whether the proof justified the exercise of the power, the Court applied a more exacting rule of law than is applicable to injunctions entered over opposition. The Court's opinion states that the defendants, controlled by experienced business men, renounced the privilege of trading in groceries "with their eyes open," and that the defendants should be left where they are found, "especially since the place where we find them is the one where they agreed to be." The Court then stated that in order to obtain modification of the decree, the burden was upon the defendants to make a "clear" showing of "grevious wrong" due to "unforeseen conditions." The language of the Court is,

> "Nothing less than a clear showing of grevious wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

Such a test has never been applied in any decision involving modification of an injunctive decree entered over opposition. The petitioner for modification in *Ladner* v. *Siegel,* 298 Pa. 487, was not required to make a "clear" showing of "grevious wrong" or to prove that when the injunction involved in that case was entered in the year 1927, he did not foresee or could not reasonably have been expected to foresee that an increase in

the use of the automobile as a means of transportation would create a necessity for garages in residential districts. Such a test should not be applied to an anti-trust decree. Anti-trust decrees are remedial, not punitive (*United States* v. *American Can Company*, 234 Fed. 1019) and the public interest should be the paramount consideration in such cases (*United States* v. *United States Steel Corporation*, 251 U. S. 417, 457).

The Court's opinion further emphasizes and relies upon the consent of the defendants to the entry of 1920 decree by stating,

> "Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of the Court confirmed the renunciation and placed it beyond recall. What was then solemnly adjudged as a final composition of an historical litigation will not lightly be undone at the suit of the offenders and the composition held for nothing."

We respectfully submit that in relying upon the defendants' consent to the decree of 1920 as a reason for reversal, the Court overlooked the Government's waiver of its right to maintain that such consent to the restraints of the decree should be considered in granting or refusing modification. The Attorney General as the representative of all branches of the public, properly took the position in the lower court that the court's decision should be based upon considerations of the conflicting public interests and not upon the question of whether the defendants were wise or foolish in 1920, or whether they did or did not foresee the changes that were to come in the meat-packing and food industry. The Attorney General informed the lower court that

> "because of the importance of the matter involved and the conflicting interests, the matter should be fully heard on the merits by the court" (R. 388).

A decision on the merits has not been rendered because the Court's opinion is based in part upon the fact that the defendant meat packers are in the unfortunate position they now occupy because they agreed to be there in 1920. This criticism of the Court's opinion cannot be answered by stating that the Court is not bound to observe the desire of the parties as to the basis of a decision. If the evidence introduced in the lower court was sufficient to require modification of an injunctive decree entered over opposition, but was not sufficient to require modification of an injunctive decree entered by consent, the Government, at the conclusion of the evidence, had a valid defense to the petitions for modification. The Court said in *Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S. 371, at page 380:

> "Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which if presented would have resulted in a decree of dismissal."

This is not a case of a failure to present a defense, but of a waiver of a defense. The Government said,

> "Arguments advanced for or against the application by any of the parties, including the Government, are to be weighed by the Court and given the same consideration, no more and no less, than they would if the decree had followed litigation." (R. 1042)

The trial court acted upon the Government's waiver and quoted this portion of the Government's brief in its opinion and we respectfully submit that this Court erred in basing its decision in part on the fact that the 1920 decree was entered by consent instead of over opposition.

III.

IN CONSIDERING THE USE OF DEFENDANTS' DISTRIBUTING SYSTEMS IN HANDLING GROCERIES, THE COURT MISAPPREHENDED THE ALLEGATIONS OF THE ORIGINAL BILL OF COMPLAINT AND OVERLOOKED CHANGES WHICH HAVE OCCURRED IN THE FOOD INDUSTRY SINCE 1920.

The Court's opinion states that "two reasons and only two" were given by the bill of complaint of 1920 for requesting that the defendants be prohibited from dealing in groceries, namely, the ability of the defendants to distribute substitute foods without a comparative increase in overhead, and the alleged ability or practice of the defendants to fix prices for groceries so low over temporary periods of time as to gradually eliminate competition. The Court then says, "whatever persuasiveness the reasons then had, is theirs with undiminished force to-day," and concludes that there has been no change in the conditions which existed in 1920.

The paragraph of the bill of complaint referred to by the Court (R. 17) alleges that the defendants had acquired a monopoly of certain substitute foods, and that this had been accomplished by the use of the defendants' distributing facilities for such substitute foods with comparatively no increase of overhead, and by employing this advantage to fix prices so low over temporary periods of time as to eliminate competition (R. 17). Having thus explained what the defendants had done and the methods employed by them, in the view of the Government, the reason for the prohibition against the sale of groceries by the defendants was stated in the bill of complaint as follows:

> "These attempts to monopolize have resulted in complete control in many of the substitute food lines. They have made substantial headway in others. The control is extensively and rapidly increasing. New

fields are gradually being invaded, and unless prevented by a decree of this Court, the defendants will within the compass of a few years control the quantity and price of each article of food found on the American table." (R. 17)

We respectfully submit that the reason stated by the Government for the restraint against the sale of groceries is found in the quoted paragraph of the bill of complaint. The Government did not ask that the defendants be prohibited from selling groceries merely because they could transport them without a comparative increase in overhead, but because the Government believed that the defendants were acquiring a monopoly and were about to perfect it as to every article of food. That reason for prohibiting the sale of groceries no longer exists. A monopoly in the food industry cannot now be acquired. The lower court so found (R. 1112), and there is no evidence in the record to the contrary.

If, however, we assume that the reasons for the prohibition against the sale of groceries were that the defendants could transport groceries without a comparative increase in overhead and that this advantage in 1920 enabled the defendants to fix prices of groceries so low as to eliminate competition, it does not follow as stated by the Court that the reasons have the same persuasiveness today as in 1920. The defendants admitted in their answers that they could handle groceries through their distributing facilities without a corresponding increase in overhead (R. 43, 69, 95-6, 121, 142 and 148), and denied that this enabled them to fix prices so low as to eliminate competition (R. 43, 71, 96, 121, 142 and 148). The record shows that at the present time the defendants could handle groceries without a corresponding increase in overhead. That fact exists now as it did in 1920. The defendants admitted it to be true in 1920 and proved it

to be true in 1930. However, there remains for consideration the controlling question of whether this ability of the defendants to handle groceries without a corresponding increase in overhead could be used by the defendants under present-day conditions in the food industry to crush competitors and acquire a monopoly. The undisputed evidence and the lower court's findings of fact negative any such conclusion.

There is a sharp distinction between an ability to do a wholesale grocery business without a relative increase in overhead charges and an ability to do such business at less expense than competitors. If the defendants engage in the wholesale grocery business they will have to pay the same transportation charges on groceries as their competitors, and the defendants' grocery business will have to carry its part of overhead expenses. The record does not bear out the assumption that these expenses would be less than the expenses of competitors. Economies would be effected, not by doing business more cheaply than competitors, as the Court seems to think, but by distributing overhead expenses over a larger volume of business.

Under present conditions it is necessary for the defendants to diversify their business in order to maintain the volume required for the operation of branch houses and car routes. The meat business alone under conditions of to-day is not sufficient for that purpose. The constantly increasing overhead is too heavy. (R. 655-6, 958a, 960, 666-70). It must be distributed over a larger volume in order to effect the necessary economies for continued operation of branch houses and car routes. Modification was granted by the lower court to enable the defendants to make this necessary distribution of overhead expenses (finding of fact number 10, R. 1111). The theory of the decision of the lower court was that

changed conditions demanded relief for the defendants which should be granted, unless there was danger of monoply (R. 1056-7). The court saw no danger of monopoly, (R. 1058) and so found as a fact (R. 1112).

IV.

THE OPINION OF THE COURT ASSUMES, CONTRARY TO THE RECORD, THAT THE ORIGINAL DECREE WAS INTENDED TO PROTECT THE INTERESTS OF CERTAIN CLASSES INSTEAD OF THE INTERESTS OF THE PUBLIC AS A WHOLE.

The injunction against the sale of groceries by the defendants restrains and lessens competition in an essential industry. The Court says in its opinion that the question in this cause is whether this restraint can be removed "without prejudice to the interests of the classes whom this particular restraint was intended to protect."

We respectfully submit that the controlling question in this cause is not whether the restraint against the sale of groceries can be removed without prejudice to the wholesale grocers, but whether it can be removed without thereby incurring danger of a food monopoly. The restraint was not imposed for the sole protection of the wholesale grocers. It was imposed, in the language of the bill of complaint, to prevent the defendants from controlling "the quantity and price of each article of food found on the American table" (R. 17). Such a result would have been detrimental not alone to the wholesale grocers, but to the entire consuming public. The wholesale grocers are naturally gratified by the present situation which curtails the competition which would normally exist in their business. The injunctive decree did not create a right in the wholesale grocers nor in anyone else. It only granted a protection (*Ladner* v. *Siegel*,

298 Pa. 487), and that protection was granted to the entire public in the form of an unprecedented restraint contrary to the theory of our anti-trust laws, because the Government believed that such action was necessary under 1920 conditions to prevent a food monopoly. The evidence and the lower court's findings establish beyond dispute that the removal of the restraint would not result in a food monopoly.

V.

THE COURT'S OPINION IGNORES THE EVIDENCE AND THE FINDINGS OF FACT TO THE EFFECT THAT A FOOD MONOPOLY IS NOT POSSIBLE.

The bill of complaint of 1920 alleges the existence of a meat monopoly between five corporations. The record shows by proof and by the admission of the government that no such monopoly exists. The record further shows that since 1920 the defendant corporations have sustained large operating losses and have been through a bankruptcy, a forced sale and refinancing. The four corporations which have survived are still of great size from the standpoint of volume of sales but their earning power is less than that of their competitors and far less than that of the large chain organizations and food manufacturing companies which have developed during the last decade.

The four defendants are in active competition with each other and are permanently enjoined from acting in concert. The Court in its opinion admits that the defendants "now compete with one another" and this fact was likewise admitted by the Government (R. 558) and found by the lower court (R. 1111). Yet in the same paragraph of its opinion this Court proceeds to compare the combined sales of all the

defendants with those of their thirteen chief competitors in order to show that "the defendants if permitted to deal in groceries would drive their rivals to the wall". But if, as is admitted, the defendants are in competition with one another, then the sales of each should be contrasted with the sales of all other packers, including the other defendants. In such case the sales of one of the largest defendants would be $1,000,000,000.00 and the sales of its sixteen chief competitors would be $1,907,000,000.00. The sales of the largest defendant thus amount to less than 35 per cent of the sales of seventeen packers selected out of a total of 998 packers under federal inspection (R. 733) and the large number of additional packers engaged solely in intrastate commerce.

The undisputed and admitted facts that each defendant is in active and keen competition with each and all of the others, and that the defendants are now under the supervision of the Secretary of Agriculture and are perpetually enjoined from acting in concert, are of themselves sufficient to prevent the strangling of competitors and the monopolizing of the market either for meat foods or groceries. It is difficult to appreciate how Swift & Company could acquire a monopoly in groceries, with Armour, Cudahy and Wilson in the field as competitors, to say nothing of the further competition to be supplied by six thousand wholesale grocers and the financially powerful chain organizations and food manufacturers. The record shows by uncontradicted evidence that a monopoly in the food industry cannot be achieved by anyone under present conditions, and the lower court so found as a fact (R. 1112). The only reason for the restraint on the sale of groceries having been removed, the public interest requires that normal competition in the food industry be restored. "Our consideration should be of, not what the corporation had power to do or did,

but what it has now power to do and is doing." (*United States* v. *United States Steel Corporation*, 251 U. S. 417, 444.) If the occasion should arise in the future, commerce can be protected by the restoration of the modified provisions of the decree under paragraph eighteenth thereof.

Three members of this Court took no part in the decision of this case. Four of the justices of this Court are of the opinion that the decree appealed from should be reversed and two justices are of the opinion that it should be affirmed. The vital importance of the case, not alone to the defendants, but also to conflicting public interests, justifies a rehearing.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that the decree of the Supreme Court of the District of Columbia, be, upon further consideration affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

The undersigned counsel for the above named Swift & Company, *et al.* and Armour & Company, *et al.*, DO HEREBY CERTIFY that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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